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**In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

**No. 1115**

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**LOUIS ZEMEL, APPELLANT**

**v.**

**DEAN RUSK, SECRETARY OF STATE, AND ROBERT F.  
KENNEDY, ATTORNEY GENERAL**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF CONNECTICUT**

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**MOTION TO DISMISS OR AFFIRM**

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Pursuant to Rule 16, paragraphs 1(a) and 1(c), of the Revised Rules of this Court, appellees move that this appeal be dismissed or, alternatively, that the judgment of the district court be affirmed.

**JURISDICTION**

This is a direct appeal from a final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2282. The judgment of the district court was entered on March 2, 1964 (J.S. 42a), and the notice of appeal was filed on March 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

**QUESTIONS PRESENTED**

1. Whether the relief requested by appellant required the convening of a three-judge court under 28 U.S.C. 2282.

2. Whether the Secretary of State is authorized by statute to restrict the travel of United States citizens to Cuba by issuing passports which are invalid for that country.

3. Whether geographical passport restrictions which are enforced by criminal sanctions violate the First, Fifth, Ninth or Tenth Amendments of the United States Constitution.

**STATUTES AND REGULATIONS INVOLVED**

The statutes involved (28 U.S.C. 2282; 22 U.S.C. 211a; 8 U.S.C. 1185) are set out in the Appendix, pp. 13-14, *infra*. The proclamations, executive orders and regulations involved are also set out in the Appendix, pp. 14-19, *infra*.

**STATEMENT**

On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. Subsequently, acting under the authority of the Passport Act of 1926 (22 U.S.C. 211a) and Executive Order 7856 (3 F.R. 681, 687), the Department of State on January 16, 1961, issued Public Notice 179 (26 F.R. 492), which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A companion press release (Press Release No. 24)

stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests."

Appellant, a citizen of the United States and holder of a valid passport, applied to the Secretary of State on March 31, 1962, to have his passport validated for travel to Cuba as a tourist (R. 45).<sup>1</sup> The request was denied (R. 46). On October 30, 1962, appellant renewed his request, stating that "the purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen" (R. 54). The renewed request was also denied on the ground that the purpose of appellant's trip did not meet the standards prescribed for such travel in the applicable press release (R. 55).

On December 7, 1962, appellant instituted this action in the United States District Court for the District of Connecticut. In his original and amended complaints he alleged that the Secretary of State's regulation restricting travel to Cuba was unauthorized by statute and deprived appellant of constitutional rights under the First, Fifth, Ninth and Tenth Amendments of the United States Constitution. The prayer for relief sought a judgment declaring (1) that appellant was constitutionally entitled to travel to Cuba, (2) that appellant's travel to Cuba would not violate any statutes, regulations, or passport restrictions, (3) that the Secretary of State's regulation

<sup>1</sup> "R." refers to the record certified by the clerk of the lower court to the Supreme Court.



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restricting travel to Cuba was invalid, (4) that the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 were unconstitutional, (5)<sup>2</sup> that the Secretary of State's refusal to grant appellant a passport valid for travel to Cuba violated appellant's constitutional rights and rights granted by the United Nations Declaration of Human Rights, and (6) that denial of the passport endorsement without a formal hearing violated appellant's rights under the Fifth Amendment.<sup>2</sup> The complaint also requested that the Secretary of State be directed to validate appellant's passport for travel to Cuba and that the appellees be enjoined from interfering with such travel. In the amended complaint, appellant also added to the paragraph which sought a declaration of unconstitutionality regarding the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 a prayer that the appellees be enjoined "from carrying out or enforcing the said statutes, as aforesaid."

On appellant's motion, and over the objection of the appellees, a three-judge court was convened. On cross-motions for summary judgment, the court, by a divided vote, granted the Secretary of State's motion for summary judgment and dismissed the action against the Attorney General "on the merits" (J.S. 42a). One of the members of the three-judge panel, District Judge Blumenfeld, was of the view that the case was not one for a three-judge court because, as

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<sup>2</sup> This procedural claim was expressly abandoned in the district court (J.S. 3a) and has not been urged here.

he said, "We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations" (J.S. 32a). On the merits, Judges Clarie and Blumenfeld sustained the validity of the regulation. Circuit Judge Smith concurred with Judge Clarie's conclusion that the case was one for a three-judge court but dissented on the merits. His ground was "that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority" (J.S. 29a).

#### ARGUMENT

We believe that there is no substantial doubt as to the constitutional and statutory validity of the Secretary of State's restriction on travel by American citizens to Cuba, and that the statutory as well as the constitutional issues in this case—which were presented on petitions for certiorari to this Court several terms ago in a series of cases arising in the District of Columbia Circuit—do not require plenary consideration. However, we are also of the opinion that the decision to convene a three-judge court was erroneous and that the case should have been heard and decided by a single district judge with appeal being to the United States Court of Appeals for the Second Circuit. Hence we submit that it would be appropriate to dismiss the present appeal on the ground that the case is not within the appellate jurisdiction of this Court.

1. Section 2282 of Title 28 of the United States Code provides that a three-judge court be impaneled in any case in which the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States \* \* \*." This is obviously not such a case. The injunctive relief sought by appellant was directed against administrative action which may have been permitted, but was surely not compelled or directed, by an Act of Congress. In addition to the declaratory relief requested, appellant sought only (1) to enjoin the appellees from interfering with his proposed trip to Cuba and (2) to compel the Secretary of State to issue the requested passport endorsement. Neither of these remedies, if granted, would have constituted restraint of the "enforcement, operation or execution of any Act of Congress." Nor does appellant's demand that the appellees be enjoined "from carrying out or enforcing" the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 convert the suit into one which must be heard by a three-judge court. This demand cannot be taken literally; for if it were granted as requested its effect would be to prohibit the issuance of *any* passport. The challenged provision of the Passport Act of 1926 states that the Secretary of State "may grant and issue passports" under certain conditions. An order enjoining the enforcement, operation or execution of this statute would be directly contrary to appellant's prayer that he be



permitted to travel to Cuba since it would bar the issuance of all passports, including the endorsement sought by appellant.

Appellant's real constitutional challenge is, as Judge Blumenfeld observed in the district court, to the regulations adopted by the President and the Secretary of State pursuant to the enabling clauses of the Acts of Congress. Consequently, the jurisdictional issue in this case is controlled by *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, in which, as in this case, the appellant's claim was that certain regulations adopted and administrative action taken under an Act of Congress were unconstitutional. This Court dismissed the appeal from a judgment entered by a three-judge court and remanded the case to the district court for the entry of a new judgment which could be appealed to a court of appeals. We submit that that course, which was also followed in *Rorick v. Board of Commissioners*, 307 U.S. 208, 213, and in *International Ladies' Garment Workers Union v. Donnelly*, 304 U.S. 243, 251-252, would preserve appellant's right to appeal from the adverse judgment and would be most consistent with the accepted construction of 28 U.S.C. 2282. See also *Thompson v. Whittier*, 365 U.S. 465; cf. *Flemming v. Nestor*, 363 U.S. 603, 606-608.

2. Should the Court conclude, however, that the case is properly here on appeal, the judgment below could be affirmed summarily since appellant's contentions do not merit plenary consideration. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, empowered the Secretary of State to issue passports

"under such rules as the President shall designate and prescribe for and on behalf of the United States."

The President's current regulations pursuant to this statute appear at 22 C.F.R. Part 51, and were issued in 1938 as Executive Order No. 7856 (3 F.R. 687). 22 C.F.R. 51.75 provides as follows (see p. 14, *infra*):

The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries; to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries. [Emphasis added.]

This delegation of power from the President to the Secretary of State to enumerate those countries in which a passport is to be invalid was a recognition of the well-established principle of international relations that suspension of travel in a foreign country is an instrument of foreign policy. See Bishop, *International Law* (1953), p. 559; 2 Hyde, *International Law* (1922), pp. 169-172; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 445-446; 2 Lauterpacht-Oppenheim, *International Law* (7th ed. 1952), pp. 134-144. In enacting the Passport Act of 1926, Congress must have been aware of the broad leeway traditionally reserved for Executive discretion in this area and of the limited function of judicial review over decisions based on considerations of foreign policy. See *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103; *United States v. Pink*, 315 U.S. 203; *Ex parte Peru*, 318 U.S. 578; *United States v.*

*Belmont*, 301 U.S. 324; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304. Hence, while the Act did not expressly provide for geographical passport restrictions, the delegation of power to the President to prescribe "rules" for the issuance of passports must have contemplated precisely this sort of limitation, even though its effect at the time would not have been—as it is today—to prohibit travel to countries for which a passport is invalid.

Moreover, in the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, Congress authorized the imposition of "restrictions and prohibitions" on the departure and entry of citizens in times of national emergency and provided criminal sanctions for the enforcement of such restrictions. Having declared a national emergency in 1950 (Presidential Proclamation No. 2914), the President empowered the Secretary of State to impose geographical passport limitations under the 1952 Act (Presidential Proclamation No. 3004). These proclamations are still in effect, and the Secretary of State's reliance upon the Immigration and Nationality Act of 1952 as a basis for his restriction of travel to Cuba indicates that this regulation is based upon the still-existing national emergency. We submit, therefore, that appellant's contention that area restrictions are unauthorized by the applicable statutes is totally without merit.

3. Appellant's constitutional challenge is equally unsound. Similar constitutional arguments were made several years ago in a series of cases considered by the Court of Appeals for the District of Columbia

Circuit and were unanimously rejected by that court. They were then presented to this Court in petitions for certiorari, and certiorari was denied. *Worthy v. Herter*, 270 F. 2d 905, certiorari denied, 361 U.S. 918; *Frank v. Herter*, 269 F. 2d 245, certiorari denied, 361 U.S. 918; *Porter v. Herter*, 278 F. 2d 280, certiorari denied, 361 U.S. 918.

The constitutional issues here are obviously distinguishable from those in a case like *Kent v. Dulles*, 357 U.S. 116. In *Kent* the central issue was whether the petitioner could be distinguished from other citizens and denied a passport—and thereby deprived of the right to travel to countries for which a passport is required—because of his particular “beliefs or associations.” 357 U.S. at 130. Appellant in this case has not been singled out or deprived of rights which other citizens are granted. The restriction on travel to Cuba is non-discriminatory, and any citizen whose purpose in traveling to that country meets the specified criteria qualifies for an exception. And whatever First Amendment rights may be involved in foreign travel surely do not confer on American citizens an unqualified right to interfere with validly adopted foreign policy by traveling to countries where the Department of State has determined that travel should be restricted and where their safety and liberty may be endangered. See the opinion of the court of appeals in *Worthy v. Herter*, *supra*, 270 F. 2d at 909-912. This is particularly true in light of the statutory obligation imposed on the President by 22 U.S.C. 1732, which requires him to take appropriate

action to protect Americans "unjustly deprived of [their] liberty by or under the authority of any foreign government."

**CONCLUSION**

For the foregoing reasons, either this appeal should be dismissed or the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

J. WALTER YEAGLEY,  
*Assistant Attorney General.*

KEVIN T. MARONEY,  
LEE B. ANDERSON,  
*Attorneys.*

JUNE 1964.



## APPENDIX

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28 U.S.C. 2282 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

22 U.S.C. § 211a (44 Stat. 887) provides:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

8 U.S.C. 1185 (66 Stat. 190) provides, in pertinent part:

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure

of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

\* \* \* \* \*

(b) Citizens. After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Executive Order No. 7856, March 31, 1938, 3 F.R. 687, 22 C.F.R. 51.75, provides in pertinent part:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, provides, in pertinent part:

#### A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency \* \* \*

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, provides, in pertinent part:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the de-

departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing, Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone,

and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

\* \* \* \* \*

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, includ-



ing the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

Public Notice 179, 26 F.R. 492 (January 16, 1961), provides:

DEPARTMENT OF STATE  
[Public Notice 179]

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the

authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961.

For the Secretary of State.

LOY HENDERSON,  
Deputy Under Secretary for  
Administration.

Press Release No. 24 (January 16, 1961) provides:

**PRESS RELEASE No. 24**

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.